# SIXTH DISTRICT COURT OF APPEAL
# STATE OF FLORIDA

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Case No. 6D23-17
Lower Tribunal No. 18-DR-3666

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ERNEST A. GAYER,

Appellant,

v.

ANTOINETTE S. NICITA f/k/a ANTOINETTE S. GAYER,

Appellee.

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Appeal from the Circuit Court for Lee County.
Lisa S. Porter, Judge.

June 16, 2023

MIZE, J.

Appellant, Ernest A. Gayer ("Former Husband"), appeals a final judgment entered in the dissolution action between himself and Appellee, Antoinette S. Nicita ("Former Wife").[1] Former Husband raises seven issues on appeal. We reverse the

[1] This case was transferred from the Second District Court of Appeal to this Court on January 1, 2023.

final judgment in part and remand for further proceedings consistent with this opinion.

## Background and Procedural History

The parties married in 2002 and separated in August 2012. The parties lived separately for six years before Former Husband filed his petition for dissolution of marriage on August 16, 2018. The court below held a trial and entered a final judgment of dissolution of marriage, which included an equitable distribution spreadsheet as an attachment. Former Husband filed a motion for rehearing, which the trial court denied. This appeal followed.

## Issues on Appeal

### I. $6,000 Credit to Former Wife for Payment of Tax Liability

In 2015, Former Husband cashed out his Florida Retirement System plan and deposited the money into an IRA. He withdrew the funds from the IRA in 2015 and 2016. Because Former Husband was less than fifty-nine and a half years old when he withdrew the funds from his IRA, he incurred taxes and an IRS penalty. In its equitable distribution scheme, the trial court gave Former Wife a $6,000 credit for payment of a portion of the IRS tax liability owed by Former Husband.

This Court reviews a determination of equitable distribution in a dissolution of marriage action for an abuse of discretion. *Gupta v. Gupta*, 327 So. 3d 950, 954 (Fla. 5th DCA 2021). However, "the distribution of marital assets and liabilities

must be supported by factual findings in the judgment or order based on competent substantial evidence." *Id.* (quoting *Bardowell v. Bardowell*, 975 So. 2d 628, 629 (Fla. 4th DCA 2008) (internal quotations, alterations omitted)). In this case, the trial court's granting of the tax credit to Former Wife was not supported by any factual findings nor was it based on competent, substantial evidence.

The final judgment states that "[t]he Court values the Wife's contributions toward the tax due at $6,000.00." However, neither the trial court's final judgment nor its oral ruling at the trial included any finding that Former Wife paid any amount towards Former Husband's tax liability. There was no evidence in the record to support such a finding. At the trial, Former Wife testified that at the time Former Husband made the withdrawals, he did not pay the taxes or penalties incurred from the early withdrawals, "[s]o [Former Wife] was stuck with it when we filed the tax returns." However, Former Wife did not testify that she ever actually paid the tax liability or, if she did, how much she paid or when. Former Husband testified that the parties split some tax payments at some point, but he did not testify as to any specific amounts paid by Former Wife.[2]

[2] Additionally, Former Husband's testimony that the parties split tax payments appears to pertain to a different tax liability discussed at the trial. In 2014, the parties received forgiveness of a credit card debt from Chase Bank, which gave rise to a tax liability. This liability does not appear to be the basis for the trial court's grant of the credit to Former Wife. Additionally, this tax liability was paid off before Former Husband filed his petition for dissolution of marriage. Therefore, neither party could have been entitled to a credit for any payments made for this tax liability.

The trial court appears to have obtained the amount of $6,000 from Former Wife's suggested equitable distribution spreadsheet. However, the spreadsheet was admitted only as a demonstrative aid – it was not evidence.

Because the trial court's grant of the $6,000 credit to Former Wife for payment of Former Husband's tax liability was not supported by any factual findings or based on competent, substantial evidence, we reverse this portion of the final judgment and remand with instructions to the trial court to remove the $6,000 credit and to adjust the equitable distribution scheme accordingly.

## II. Failing to Distribute an SBA Loan as a Marital Liability

In April 2018, Former Husband obtained an SBA FEMA loan in the amount of $25,000. The balance owed on the SBA loan as of the date of the filing of the petition was $24,251.96. The trial court classified the SBA loan as a nonmarital liability of Former Husband. Former Husband contends that the trial court erred by classifying the loan as nonmarital instead of marital.

We review a trial court's characterization of a liability as marital or nonmarital de novo. *Fortune v. Fortune*, 61 So. 3d 441, 445 (Fla. 2d DCA 2011). We review any factual findings necessary to make the classification for competent, substantial evidence. *Dravis v. Dravis*, 170 So. 3d 849, 852 (Fla. 2d DCA 2015).

Here, because the parties did not have a separation agreement, the trial court properly found that the cut-off date for determining assets and liabilities to be

classified as marital or nonmarital was the date of the filing of the petition for dissolution of marriage, which was August 16, 2018. *See* § 61.075(7), Fla. Stat. (2018). Despite setting the correct cut-off date, and despite the trial court finding that the SBA loan was incurred before the cut-off date in April 2018, the trial court classified the SBA loan as nonmarital. This was incorrect as a matter of law. Because the SBA loan was incurred prior to the cut-off date, the loan was a marital liability. *See* § 61.075(7), Fla. Stat. (2018). We reverse this portion of the final judgment and remand with instructions to the trial court to classify the SBA loan as a marital liability and to adjust the equitable distribution scheme accordingly.

**III. Failing to Distribute Capital One Credit Card as a Marital Liability**

At the trial below, the undisputed evidence established that at the time of the filing of the petition for dissolution of marriage, Former Husband had a Capital One credit card account that was reflected in Former Husband's Exhibit 29. Former Husband argues that the trial court failed to classify or distribute this liability. Former Husband is correct. The final judgment does not make any reference to this account.

"In fashioning an equitable distribution, a court is required to make specific written findings of fact that identify, classify, value, and distribute the parties' assets and liabilities." *Pavese v. Pavese*, 932 So. 2d 1269, 1270 (Fla. 2d DCA 2006) (citing § 61.075(3), Fla. Stat.). Failure to do so necessitates reversal. *Id.* We remand this

case to the trial court to identify, classify, value, and distribute the Capital One credit card account reflected in Former Husband's Exhibit 29, and to adjust the equitable distribution scheme accordingly.[3]

## IV. The Final Judgment and Equitable Distribution Worksheet are Internally Inconsistent.

Former Husband asserts that there are inconsistencies between the final judgment and the equitable distribution spreadsheet attached thereto concerning the parties' retirement accounts and certain credit union accounts that briefly held funds from the Former Husband's retirement accounts during the process of Former Husband's cash out from his Florida Retirement System plan. Former Wife concedes error on this point.

We reverse this portion of the final judgment and remand to the trial court to correct the inconsistencies between the final judgment and the equitable distribution spreadsheet, and to adjust the equitable distribution scheme accordingly. *See Suk v. Chang*, 189 So. 3d 224, 226 (Fla. 2d DCA 2016) ("[D]issolution judgments that contain internal inconsistencies must be reversed so the inconsistencies can be corrected.").

[3] There were other Capital One accounts that the trial court did identify, classify, value, and distribute.

## V. The Trial Court Erred in Basing Alimony on Gross Income Rather Than Net Income and in Failing to Make Findings Regarding Need and Ability to Pay.

The trial court awarded Former Wife durational alimony in the amount of $1,000 per month for ten years. The final judgment includes findings regarding Former Husband's gross income but does not include findings regarding either party's net income or findings regarding the amount of Former Wife's need or Former Husband's ability to pay. In his fifth point on appeal, Former Husband argues that the trial court erred by basing the award of alimony on Former Husband's gross income rather than on the parties' net incomes. Former Wife concedes that the trial court erred by basing the alimony award on Former Husband's gross income rather than the parties' net incomes, but Former Wife requests that we nonetheless uphold the alimony award while merely remanding the case to the trial court to make findings of the parties' net incomes to support the alimony award that the trial court already made. In other words, Former Wife requests that we overturn the factual basis for the alimony award but not the award itself, and that we then order the trial court to provide a new factual basis for the already predetermined alimony award. It's certainly a novel approach.

Former Husband is correct that the alimony award must be reversed. As we recently stated, "failure to make specific findings regarding the parties' net incomes

necessitates reversal of the alimony award." *Reese v. Reese*, No. 6D23-201, 2023 WL 3400377, at *6 (Fla. 6th DCA May 12, 2023).

In his seventh point on appeal, Former Husband argues, among other things[4], that the trial court erred in awarding alimony without making specific factual findings regarding Former Wife's need and Former Husband's ability to pay. Former Husband is correct on this point as well.

> "In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance." § 61.08, Fla. Stat. (2011). The parties' respective need for and ability to pay alimony must be based on the parties' net incomes. *Soria v. Soria*, 237 So. 3d 454, 460 (Fla. 2d DCA 2018) (quoting *Conlin v. Conlin*, 212 So. 3d 487, 488 (Fla. 2d DCA 2017)); *Badgley v. Sanchez*, 165 So. 3d 742, 744 (Fla. 4th DCA 2015) ("The judgment is also deficient for failing to look to the parties' net incomes in assessing need and ability to pay."); *Ogle v. Ogle*, 334 So. 3d 699, 702 (Fla. 1st DCA 2022) ("To determine a party's ability to pay, net income (after expenses), not gross, must be considered."); *Kirby v. Kirby*, 345 So. 3d 356, 357 (Fla. 5th DCA 2022) ("[I]t appears that the trial court relied on Former Husband's gross income when calculating his alimony obligation. This is reversible error.").

*Reese*, 2023 WL 3400377, at *6.

[4] Former Husband also argues in his seventh point on appeal that the trial court abused its discretion in awarding Former Wife alimony because the trial court failed to consider the amount of debt owed by Former Husband to his creditors. Former Husband argues in his sixth point on appeal that the trial court erred by considering the health insurance he receives at no cost to him through his retirement benefits as income to him for purposes of determining the alimony award. Given our reversal of the alimony award for the reasons stated herein, we need not address either of these issues.

For these reasons, we reverse the alimony award in the final judgment and remand with instructions to the trial court to make specific factual findings regarding the parties' respective net incomes, to make specific factual findings regarding Former Wife's need and Former Husband's ability to pay based on their respective net incomes, and to then consider the factors set forth in section 61.08(2), Florida Statutes, in deciding Former Wife's request for alimony.

## Conclusion

We reverse the final judgment to the extent stated above and remand this case to the trial court for further proceedings consistent with this opinion. On remand, the trial court may determine whether it requires an additional evidentiary hearing to comply with this opinion or whether the evidence in the record from the final hearing is sufficient for the trial court to enter an amended final judgment that complies with this opinion without the necessity of an additional evidentiary hearing.

REVERSED and REMANDED with INSTRUCTIONS.

TRAVER, C.J., and NARDELLA, J., concur.

Stacy L. Haverfield, of Stacy L. Haverfield, P.A., Fort Myers, for Appellant.

Chris Santospirito, of Rubinstein & Holz, P.A., Fort Myers, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED